BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MELINDA ELLIS	)	
Claimant	)	
	)	
VS.	)	
	)	
T-MOBILE	)	
Respondent	)	Docket No. 1,010,151
	)	
AND	)	
	)	
KEMPER INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the October 30, 2003 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

The Administrative Law Judge (ALJ) determined claimant sustained accidental injury arising out of and in the course of her employment. The ALJ further found proper notice was provided.

The respondent requests review of this determination and argues the ALJ erred in finding the claimant's injury arose out of and in the course of her employment and provided timely notice.

Claimant argues the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

This claim was the subject of a prior appeal from a preliminary hearing Order issued on June 13, 2003. In that Order, the ALJ made the following findings:

> The Court finds the Claimant has made a *prima facia* case that she sustained injury to her upper extremities while in the course and scope of her employment with the Respondent. Based upon her testimony, the Court finds proper notice was given within the 75 days allotted for just cause, that just cause being the Claimant thought her condition would subside or disappear when she was no longer employed.
>
> Dr. Pedro Murati shall perform an independent medical evaluation for an opinion as to whether or not the Claimant has a repetitive use injury to her upper extremities bilaterally and an opinion as to causation if any injury is found. In the event that Dr. Murati finds the Claimant has sustained an injury to her upper extremities either caused or contributed to by her employment, then Dr. Murati shall be the authorized treating physician for all treatment, tests and referrals, except referrals to rehabilitation hospitals. Any change to Dr. Murati's authorization must be approved by the Court.[1]

Respondent appealed this Order to the Board alleging there was no evidence from a physician that established claimant had a condition caused by the employment. On August 14, 2003, the Board issued an Order dismissing the appeal, finding it had no jurisdiction to hear an appeal from an interlocutory order appointing Dr. Pedro Murati to conduct an independent medical examination to speak to the issue of causation.[2]

Following his examination, Dr. Murati tendered a written report to the ALJ setting forth his diagnoses, treatment recommendations and opined as to the cause of claimant's bilateral arm complaints. Thereafter, the matter was again heard by the ALJ on October 21, 2003, for the purpose of ruling on the causation issue as well as whether claimant provided timely notice as required by K.S.A. 44-520, the same arguments advanced in the earlier appeal.

The facts of this claim are simple. Claimant was employed by respondent as a customer service representative beginning October 1, 2001. As a customer service representative, claimant testified she spent her entire workday using a computer keyboard, noting account changes and retrieving information. This job required her to use her upper extremities. She originally worked 10-hour days but in approximately September 2002 she began working part-time, 20 hours per week.

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[1] ALJ Order (June 13, 2003).

[2] *Ellis v. T-Mobile USA, Inc.*, No. 1,010,151, 2003 WL 22150567 (Kan. WCAB Aug. 14, 2003).

In the late spring or early summer of 2002, claimant began to notice pain, tingling and numbness in her hands and wrists. These symptoms eventually migrated up to her elbows. Claimant testified that she did not know the cause of her problems nor was she familiar with the symptoms of carpal tunnel syndrome. She sought no treatment on her own nor did she inform her employer of her physical problems. Claimant eventually noticed that when she would have multiple days off, her symptoms would subside.

According to respondent's computer records, claimant spent 89.95 hours in 2002 on her keyboard. However, the record shows that this figure does not reflect all of the time claimant spent utilizing the keyboard but, rather, only that time spent performing certain work that is coded and recorded.

At this same time, claimant was taking family leave for her son's illness and was working on an intermittent basis. She returned to work on February 12, 2003, at her job in customer service on a part-time basis. According to respondent, claimant worked a total of 12 hours and 54 minutes in 2003 for respondent and spent most of that time retraining, an activity that does not involve any keyboard use. In a letter dated February 27, 2003, claimant was advised that she was terminated for excessive absences.

Claimant first notified respondent of her alleged work-related injury on April 15, 2003, when her attorney served a written notice of claim. Claimant admits this would have been respondent's first notice of her alleged work-related claim. She further admits she sought no treatment on her own. Dr. Murati has evaluated claimant and opined "[t]his patient's current diagnoses [bilateral carpal tunnel syndrome and bilateral ulnar cubital syndrome] are within all reasonable medical probability a direct result of the work-related injury that occurred each and every working day through 02-12-03, during her employment with T-Mobile."[3]

In proceedings under the Workers Compensation Act, it is claimant's burden to establish claimant's right to an award of compensation proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g), as amended.

In order for claimant to collect workers compensation benefits under the Workers Compensation Act, she must suffer accidental injury arising out of and in the course of her employment. The phrase "out of" employment points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises

[3] P.H. Trans. (Oct. 21, 2003), Cl. Ex. 1 at 2.

"out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred and means the injury happened while the workman was at work in his employer's service. *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

The Board finds, based upon the record as it presently exists, claimant has established that it is more probably true than not that she sustained an accidental injury arising out of and in the course of her employment with respondent. While it is true that claimant worked less hours in 2002 and even less in 2003, her recitation of the gradual onset of symptoms and the temporary relief she would experience on her days off is not unusual given the nature of her injury. Although respondent's human resources specialist contends claimant had limited exposure to the keyboard in 2002 and 2003, the greater weight of the evidence, as presently developed, supports claimant's contention that she was injured. Accordingly, the ALJ's finding on this issue is affirmed.

Respondent also argues claimant failed to provide the requisite notice. K.S.A. 44-520 requires a claimant provide notice of a work-related accident to his or her employer within 10 days of the date of the accident. The notice must state the time, place and particulars of the accident so as to alert the respondent to the possible work connection to the injury and the potential for a claim. See e.g., *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978). That same statute permits the reporting period to be extended when the employee has "just cause" for not reporting the accident in a timely manner.

Although not intended as an exhaustive list, some of the factors to consider in determining whether "just cause" exists are:

(1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
(2) Whether the employee is aware he or she has sustained either an accident or an injury on the job.
(3) The nature and history of claimant's symptoms.
(4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-12-2.

When just cause is an issue, the above factors should be considered but each case must be determined on its own facts. After considering the record as a whole, the Board finds that the ALJ did not err in finding claimant had established "just cause" with regard to notifying respondent of her work-related injury. Claimant testified her symptoms would wax and wane over time. When she was off for a few days, she would notice the pain and numbness less but upon her return to work, performing keyboarding activities, she would

again experience an increase. She also testified that she was not familiar with the symptoms of carpal tunnel syndrome and did not clearly associate her complaints with work. She had not sought treatment for her complaints and there is no evidence she had been told work was causing her injury until she was seen by Dr. Murati, the physician who was ordered to examine her pursuant to the ALJ's June 13, 2003 Order. In addition, she was dealing with her son's illness and that matter was surely her primary focus during 2002 and into 2003, when she was terminated. For these reasons, the ALJ's finding on the issue of timely notice should be affirmed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Jon L. Frobish dated October 30, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2003.

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BOARD MEMBER

c: Thomas M. Warner, Jr., Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director